In the

Supreme Court

of the

United States

October Term, 1927

No. 65

RAY C. SIMMONS,
Petitioner,

v.

EDWARD P. SWAN,
Respondent.

BRIEF FOR THE RESPONDENT

William A. Davenport,
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STATEMENT OF FACTS.

This is an action of contract to recover the damage which the petitioner claims he suffered by reason of an alleged breach of a written contract entered into between the parties on September 13, 1923. (R. Pg. 4 and 5)

The case was tried before Mr. Justice Brewster and a jury in the District Court of the United States for the District of Massachusetts and a verdict for Swan was directed by order of the court.

Upon writ of error to the Circuit Court of Appeals for the First Circuit, the judgment was affirmed by a majority of the Court. (R. Pg. 197 to 201.)

The case comes here on a writ of certiorari to review that decision and judgment.

The evidence showed that after some preliminary negotiations, the parties called at the office of Davenport & Fairhurst, Attorneys, of Greenfield, Massachusetts, and there on September 13, 1923, the contract (Exhibit "A") (R. Pg. 5) was drawn up and executed.

In substance this contract provided for the sale by Swan to Simmons of certain real estate in South Deerfield, Massachusetts, all tank pickles on the premises and the pickle business theretofore conducted by Swan.

Payment for the real estate and pickle business (and including the tank pickles) was to be made as follows:

$500.00	Five Hundred Dollars — Deposit on execution of agreement.
2500.00	Twenty-five Hundred Dollars — on or before October 1, 1923.
12000.00	Twelve Thousand Dollars — demand note of Simmons bearing interest at 6% payable semi-annually.
$15000.00	*Total*

This demand note was to be secured by suitable mortgages in standard form covering the property conveyed.

Payment for the tank pickles was to be made at the rate of $4.00 per thousand according to the receipt book (Cucumbers Received) of Swan, by demand note of Simmons, F. C. Gould, and T. J. Mohumphy as joint makers.

The time set for the performance of the agreement was on or before October 1, 1923, and the place the office of Davenport & Fairhurst, Attorneys, Greenfield, Massachusetts.

The agreement further provided that:

> "Tender of performance on the part of the Party of the First Part shall be sufficient if on said date a deed and bill of sale, in accordance with the provisions hereof, is left with said Davenport & Fairhurst for delivery to the Party of the Second Part; and tender of performance shall be sufficient on the part of the Party of the Second Part if on said date the sum of Twenty-five Hundred Dollars ($2,500.00) plus suitable notes and mortgages, are left with

said Davenport & Fairhurst for delivery to the Party of the First Part."

It was expressly stipulated that "time is of the essence of this contract."

On September 22, 1923, Swan wrote Simmons:

> "You spoke about giving me a check in full for *pickle stock* and trust you will do so as it would be more convenient for me." (R. Pg. 28.)

In reply he received the following letter written by F. C. Gould of the Silver Lane Pickle Company, with which Simmons was connected:

> "Replying to your kind favor of recent date. We expect to be at your place Monday, October 1st, but not early in the morning. It is Election Day here and we want to vote before leaving. We can make arrangements to pay a large proportion of cash providing you can make it an object for us to do so. Presume we can arrange that part satisfactorily." (R. Pg. 54.)

Monday, October 1st, was the last day set for the performance of the contract.

Swan, gathering from the letter that Simmons was not coming in the morning and having affairs in Springfield, went there with his wife (R. Pg. 149) and thence to Westfield, thence home to South Deerfield and straightway to Greenfield.

Around twelve o'clock Simmons and Gould arrived at Greenfield at the office of Davenport & Fairhurst (R. Pg. 29.)

About two o'clock Swan called Mr. Fairhurst from Westfield to inquire if the parties were there and to tell him that he was on his way to Greenfield and would probably be there by three o'clock. (R. Pgs. 30, and 164.)

This information was communicated to Simmons and Gould.

Around two o'clock Simmons and Gould consulted F. J. Lawler, Esq., a practising attorney in Greenfield for thirty years, and went over with him the matter of the contract. (R. Pgs. 47 & 66.)

Soon after three o'clock, Simmons, Gould, and Attorney Lawler, arrived at the office of Davenport & Fairhurst. (R. Pg. 48.)

Molumphy, whose signature was needed to the pickle note, did not leave Connecticut until about one o'clock and traveling by automobile, reached Greenfield at the office of Davenport & Fairhurst about three o'clock or a little after (R. Pg. 61) but his associates were already there. (R. Pg. 58.)

The banks in South Deerfield and Greenfield close at three o'clock. (R. Pgs. 57, 63 and 64.)

The evidence was conflicting as to the time that Swan arrived in Greenfield, varying from 4:15 P. M. (R. Pg. 150), or 4:30 P. M. (R. Pg. 183), 5:45 (R. Pg. 64) to between 5:00 and 6:00 P. M. (R. Pg. 31.)

The pickle note was then figured and the papers were signed.

A discussion then took place relative to Swan's engaging in a competing business and after some discussion it was finally agreed to insert in the bill of sale an agreement that he should not compete for a period of fifteen (15) years. (R. Pg. 183.) Further discussion then ensued relative to the demand note (R. Pgs. 150, 184 and 185) and Simmons, his associates and lawyer withdrew to another room and had a long conference, finally returning and announcing that they were going through with the deal. (R. Pgs. 170 and 184 and 185.)

Gould thereupon tendered to Swan what appeared to be a check (but which was in fact a certificate of deposit of the Produce National Bank of South Deerfield) in the sum of $2,500.00. (R. Pgs. 151 and 185.)

Swan refused the check insisting on money or cash. (R. Pgs. 35, 37, 66, 67, and 168.)

None of the parties had "money" and tender was then

made by each party to the other of the necessary papers, excepting that in place of "money" the check was tendered and refused. (R. Pg. 185.)

The certificate of deposit was payable to F. C. Gould but was not endorsed. (R. Pgs. 54, 55, 185.)

LAW AND ARGUMENT

The declaration in the case at bar alleges the execution of the contract in question and then states:

> "At the time specified in said contract, the plaintiff was ready, able and willing to perform all the acts and things required of him to be done and performed by the terms of said contract, and offered to the defendant so to do, and demanded of the defendant that he perform and do the things required of him by the terms of said contract." (R. Pg. 4.)

This was the claim which the defendant was called upon to meet, namely, that the plaintiff was

> "ready, able and willing to perform his contract and offered so to do."

Yet the evidence showed beyond any question of doubt that the plaintiff was not ready, able and willing to so perform.

In fact, the record (Pg. 11) shows that the plaintiff now claims recovery because he was "obstructed and prevented" by the defendant from making such tender of performance as was required of him.

No contention was made by the plaintiff that "legal tender" had been offered.

The Court: "The plaintiffs do not contend, do they, that this is legal tender?"

Mr. Bryant: "Oh, no."

The Court: "There is no question about that." (R. Pg. 69.)

Even assuming for purposes of argument that the defendant did obstruct or prevent a proper tender by the plaintiff, yet this would not avail the plaintiff.

Having sued upon a special contract, and averred actual performance on his part, he must prove such performance and cannot have a recovery upon the ground that the defendant has waived any of these requirements by conduct or otherwise.

Putnam-Hooker Co. vs. Hewins, 204 Mass. 426 *at* 430.

It is well established that upon an averment of performance the plaintiff cannot recover by proof of a waiver.

Allen vs. Burns, 201 Mass. 74 *at* 76.

If the plaintiff is to rely upon a waiver by the defendant, it should be pleaded and proved as an excuse for non-performance.

Freeland vs. Ritz, 154 Mass. 257 *at* 262.

As was said in

Colt vs. Miller, 10 Cush. 49 *at* 51.

"It is a cardinal rule of evidence that allegations essential to the plaintiff's claim must be proved. In the declaration in this case, it was essential, in order to show the plaintiff's claim, that he should allege that he furnished or was ready to furnish the defendant with the materials on which he was to work, and in season for him to complete the work on them within the stipulated time; or else, that he should allege a sufficient excuse for not so furnishing them. The plaintiff has adopted the former course and has alleged his

performance of what the agreement required of him; and to prove this allegation he relies on evidence of matter which excused him from such performance, to wit: a waiver thereof by the defendant. But a waiver, by one party to an agreement, of the performance of a stipulation in his favor, is not a performance of that stipulation by the other party. It is an excuse for non-performance and, as above stated, should be so pleaded."

See generally: Palmer vs. Sawyer, 114 Mass. 1 @ 13.
Pomeroy vs. Gold, 2 Met. 500 @ 502.
Gilbert Co. vs. Butler, 146 Mass. 82.
Palmer vs. Stockwell, 9 Gray, 237.
Bradstreet vs. Baldwin, 11 Mass. 228 and see Note @ 233.

The contract specifically called for a "tender of performance" and the plaintiff knew or ought to have known what was demanded of him in order to put the defendant in default. (R. Pgs. 5, and 6.)

Such tender of performance was to be sufficient on the part of the plaintiff if there should be left with Davenport & Fairhurst for delivery to the defendant:

(1) The sum of Twenty-Five Hundred Dollars ($2,500.00).

(2) Plus suitable notes and mortgages.

Why the performance of the contract was postponed until the last day is beyond us.

Certainly there was no evidence that Swan was responsible for such delay.

The contract was executed September 13, giving eighteen (18) days within which to allow the plaintiff to raise the sum of $2,500.00 and sign the papers. Yet the plaintiff waited until the very last day to perform and this though the contract specifically stated that "time is of the essence of this contract."

Time being of the essence, tender must be made within it.

Smith & Rice Co. vs. Canady, 213 Mass. 122.

Although at law, time is always of the essence.

Preferred Underwriters vs. N. Y. N. H. Railroad, 243 Mass. 457 *at* 463.
Chatalian vs. DiFusco, 244 Mass. 513.

A letter was written to Swan that
"We expect to be at your place Monday, October 1st, but not early in the morning. It is Election Day here and we want to vote before leaving." (R. Pg. 54.)

The plaintiff in company with Gould reached Greenfield around noon. They saw their lawyer about two o'clock and had him search the title to the property and went over the agreement with him. (R. Pg. 65.)

Molumphy, whose signature was needed to the pickle note for $14,000.00 and some odd dollars, did not leave Connecticut until about one o'clock and travelling by automobile, reached Greenfield about three o'clock, or a little after. (R. Pg. 61.)

The exact time he reached the office is uncertain, but when he arrived there his associates and lawyer were there at the office and they testified that they did not arrive there until soon after three o'clock. (R. Pgs. 48-58.)

In other words, *before the plaintiff could have made any kind of tender or be able, ready and willing to perform, he needed Molumphy, who did not appear in Greenfield until after three o'clock and the banks were then closed.*

Yet they attempt to charge the delay to Swan. Their letter was to the effect that they were not coming early in the morning and their party was not complete and ready to do business until after three P. M.

Can they then complain that Swan reached there but an hour or two later? Swan says it was 4:15 (R. Pg. 150) and it certainly must have been before five o'clock for the

stenographers were still on duty at the office and they leave daily at five P. M. (R. Pg. 183.)

There was a long delay and discussion at the office caused, not by Swan, but by the plaintiff and his associates. (R. Pgs. 150, 170, 183, 184, 185.)

Then it was that the "check" or "certificate of deposit" for $2,500.00 was tendered in performance of the contract and refused, and demand made for "money or cash." (R. Pgs. 35, 37, 66, 67 and 168.)

We respectfully submit that Swan was well within his legal rights in refusing to accept a certificate of deposit in place of legal tender.

The contract was to pay so many "dollars" and this, according to the universal understanding and holdings in the courts of Massachusetts and of the United States, means "lawful money of the United States," that is to say, money which by the Acts of Congress constitutes legal tender.

Vick vs. Howard, 136 Va. 101 *at* 108.

In the case of

Pearlstein vs. Novitch, 239 Mass. 228,

the contract in question expressly recited that the purchase price was "Twelve Thousand Five Hundred Dollars ($12,500.00.)"

The court said on Page 231 that

> "such recital is to be construed as an agreement to pay the amount in cash"

and the plaintiff, not having paid or tendered to the defendant $12,500.00 the purchase price in cash, could not recover.

See: Beach & Clarridge Co. vs. American Steam Gauge Co., 202 Mass. 177.

Ryan vs. Hall, 13 Met. 520.
Dixon vs. Williamson, 173 Mass. 50.
Vick vs. Howard, Supra.

Legal tender means tender of gold, silver, or such currency as the Federal Congress has prescribed.

Hallowell Bank vs. Howard, 13 Mass. 234.
Sargent vs. Southgate, 5 Pick. 311 *a* 319.
Julliard vs. Greenman, 110 U. S. 204 *a* 215.
Morrill vs. Brown, 15 Pick. 173 *a* 175.

Bank notes are not legal tender if objection is made on that account.

Snow vs. Perry, 9 Pick. 539 *a* 541.
Phillips vs. Blake, 1 Met. 156 *a* 158.
Ward vs. Smith, 7 Wallace (U. S.) 447.

A cashier's check is not legal tender and need not be accepted.

Beach & Clarridge Co. vs. American Steam Gauge Co., Supra.

Nor, in fact, is any check or certificate of deposit.

Servel vs. Jamieson, 255 Fed. Rep. 892.

This being true, in the absence of a waiver, express or implied, the defendant's right to demand legal tender was perfectly clear.

Vick vs. Howard, 136 Va. 101 *a* 108, and cases therein cited.

No such tender was ever made by the plaintiff nor was he ready and able to make such a tender when Molumphy reached the office of Davenport & Fairhurst after the close of the banks on October 1st, 1923.

It cannot, therefore, be said that in the words of the declaration in the case at bar

> "the plaintiff was ready, able and willing to perform all acts and things required of him to be done and performed by the terms of said contract, and offered to the defendant so to do."

Certainly it was necessary for the plaintiff to prove that he tendered performance on his part.

Harvey vs. Bross, 216 Mass. 57 *@* 60.

Or at best, before he could put the other party in default for non-performance, he must show a readiness and ability on his own part to perform.

Hapgood vs. Shaw, 105 Mass. 276.
Carpenter vs. Holcomb, 105 Mass. 280.
Howland vs. Leach, 11 Pick. 155.
West vs. Platt, 127 Mass. 367.

As was said in

Linton vs. Allen, 154 Mass. 432 *@* 439.

> "the plaintiff must show that he was ready, willing, and able to do his part, and the defendant had notice thereof, and that nothing short of this would put the defendant in legal default."

And in

Breed vs. Hurd, 6 Pick. 356.

it was said that to make a proper tender

> "the party must have the money about him wherewith to make the tender."

The plaintiff says that he was able, ready and willing to perform, but

(1) He did not have legal tender as called for by his contract.

(2) He did not draw, sign or tender his demand note for $12,000.00.

(3) He did not draw, execute or tender his real estate mortgage.

(4) He did not draw, execute or tender his personal property mortgage.

(5) He came to Greenfield evidently expecting that all papers were to be drawn by Swan's attorney because the original contract was so drawn and in order to save himself expense.

(6) Neither he nor his attorneys at any time before Swan arrived drew, executed or offered any of these papers.

(7) And further, the plaintiff refused to take a bill of sale in accordance with his contract unless and until Swan had stipulated that he would not engage in a competing business for a period of fifteen (15) years. And this matter was discussed at great length. (R. Pg. 183.)

Yet the plaintiff says that he was able, ready and willing to do business in accordance with his contract and charges the breach to the defendant.

It would be a waste of time to dwell further on this aspect of the case for it must be perfectly clear that the plaintiff at no time was "ready, willing and able to perform and offered so to do."

The only thing left for the plaintiff is to argue, as we presume he will, that he was "obstructed or prevented" from so performing by the defendant, and hence the presentation of legal tender was waived, or at least the defendant is estopped to take advantage of the improper tender.

Surely the plaintiff cannot argue that the acceptance of the initial check for $500.00 on the signing of the contract bound the defendant to accept a check at the final performance thereof, or waived his right to demand that the final payment be made in currency.

In law, logic and reason, that could not be so.

Servel vs. Jamieson, Supra.
Vick vs. Howard, Supra at 110.

Even the acceptance of a number of previous checks or payments in current funds would not have constituted a waiver as to any unpaid balance.

Servel vs. Jamieson, Supra.
Vick vs. Howard, Supra.

In this case the initial deposit was $500.00 while the total contract price was approximately $30,000.00.

And it should be observed that in the case at bar there was no evidence that the parties to this contract had ever had any personal business dealings before.

The plaintiff attempted to introduce evidence of business dealings had between the defendant and the Silver Lane Pickle Company but such evidence was excluded as res inter alios, and as no proof of custom or course of conduct between the parties to this suit. (R. Pgs. 14, 104, 105.)

It may be true that by common consent debts are usually paid in any funds which ordinarily pass as money; but no such custom, even if proved, would entitle the plaintiff, over the protest of the defendant, to make payment in such manner.

Vick vs. Howard, Supra, *at* 110.

As previously stated, the plaintiff has failed to prove his case as laid and under the authorities quoted, the question of "obstruction or prevention" has no pertinency to the case.

But even assuming that it had a legitimate place in this case, yet we submit there was no proof of any "obstruction or prevention" by the defendant which disabled the plaintiff from performing or offering to perform his contract.

We don't question that it is well settled law that

> "he who *prevents* a thing being done, shall not avail himself of the non-performance he has occasioned."

Fleming vs. Gilbert, 3 Johnson (N. Y.), 520 *at* 523.

Or that he cannot insist upon a condition, the non-performance of which has been *caused* by himself.

Tighe vs. Maryland Casualty Co., 218 Mass. 468.

There are many cases where tender has been excused where the person to whom the tender was to be made absented himself so as to avoid the tender.

Borden vs. Borden, 5 Mass. 67.
Gilmore vs. Holt, 4 Pick. 258 *at* 264.
Southworth vs. Smith, 7 Cush. 391.

Or was absent from the Commonwealth so that a tender could not be made.

Tasker vs. Bartlett, 5 Cush. 359.

Or "dishonestly and arbitrarily" or "wilfully and fraudulently" or "capriciously" prevented performance.

Hebert vs. Dewey, 191 Mass. 403 *at* 411.

In such cases it has uniformly been held that a tender is a mere idle ceremony and proof of willingness and *readiness* to perform is the equivalent of a tender and sufficient.

But always, without exception, the courts have said that the plaintiff must have been

"*able*, willing and ready to perform."

As was said many years ago, by Parker, C. J., in

Frazier vs. Cushman, 12 Mass. 277:

"In all those cases, the party intending to perform the contract on his part, proved that he was *actually ready* and had offered to perform; and that the other party had evaded or refused to receive the money offered, or other thing to be tendered, with a *declaration, or acts* amounting to it, that he did not intend to perform the contract on his part. In such cases it has been wisely determined, that, as an actual tender would be idle and useless, if not impossible, the readiness and offer shall be a legal

substitute. He who prevents the performance of a contract shall not take advantage of its non-performance."

And in the same case, the court said:

"This conduct may have been artful and disingenuous on the part of the defendant, designed to put the plaintiff off his guard and to deprive him of the benefit of his contract, but we cannot give more effect, in a legal point of view, to the acts of the parties, because one of them had more understanding and artifice than the other. A court of equity might possibly afford relief; but we can only administer the law."

But *when one party* to the contract, such as Swan in the case at bar, *actually tenders performance* of the things required of him, *it is absolutely essential that the other party to the contract likewise tenders performance.*

Mere readiness and willingness to perform is then not enough.

He must offer to do and perform those things required of him by his contract.

A tender imports not only readiness and ability to perform, but actual production of the thing to be delivered. The formal requisite of a tender may be waived, but to establish a waiver there must be an *existing capacity* to perform.

Leask vs. Dow, 92 N. Y. Supp. 891.
Bane vs. Railroad, 171 N. C. 328.

The plaintiff never had "legal tender" and in that respect was never "ready and able" to perform.

The plaintiff claims that it was for the jury to determine whether there was any "obstruction or prevention" of performance.

But what evidence was there for the jury on this question?

The court in granting the motion for a directed verdict said

> "I have been considering what I would say to the jury, and I don't see how possibly I could say anything except to say that there was no evidence to show that the tender was obstructed or prevented by the delays of the defendant." (R. Pg. 193.)

And we submit that the court was right. Surely the plaintiff cannot contend that it was the function of the jury to speculate, guess or conjecture as to whether Swan obstructed or prevented performance. There was not a scintilla of evidence in this respect.

Merely the fact appeared that Swan arrived in Greenfield somewhere between 4:15 and 5:45 P. M. and Mulumphy did not appear until after three P. M.

There was no *act* of Swan that prevented or obstructed the plaintiff from getting some time during the day $2,500.00 in legal currency.

The plaintiff consulted his lawyer shortly after noon and was with him until seven P. M. or so.

He was to blame for waiting until the last day set for performance.

He knew that "time was of the essence."

He knew or ought to have known that the certificate of deposit could be refused.

He was not ready to do business and make any kind of tender until Mulumphy arrived after the banks had closed at three o'clock.

It is obvious that he took a chance.

How, then, without proof by any evidence, can he now say that Swan obstructed or prevented him from having in his possession $2,500.00 in currency?

We respectfully submit that no case can be found where the jury was permitted to speculate or guess as to the exis-

duct of the defendant in obstructing or preventing performance.

There must be some evidence of an *overt act of prevention, obstruction or hindrance* to constitute a waiver.

In the case of

Servel vs. Jamieson, 255 Fed. Rep. 892,

wherein are some of the aspects of the case at bar, the plaintiff's agent, Stitt, was *ready to perform* his contract at eight A. M. One of the defendants took him by automobile to a town named Glasgow where they arrived at one P. M. Then he told Stitt to go to Nashua and that he would find the other defendant there and they would all meet there for a settlement. Stitt went to Nashua by train, he understanding that the defendant was to come by automobile. He reached Nashua at two P. M. and searched for the defendant but he was not there. He thereupon secured an automobile and went back to Glasgow, arriving there at four P. M. and there met both of the defendants on the street and told them that he was ready to settle. A check was then offered and refused because not legal tender.

The plaintiff made an offer of proof that arrangements had been made with the bank to honor this check and notice was given to the defendants.

The court said:

> "In view of these features of the evidence and the plaintiff's offer of proof, from which the jury might have found that, but for such delay, the currency might have been obtained to make payment on that day, we think it was error to direct the jury to return a verdict for the defendants."

In that case there was clear evidence of *an overt act* on the part of the defendants. The plaintiff was deliberately sent astray by one of the defendants.

In the case at bar, there was no *overt act* of prevention or obstruction of performance. Further, there was no evidence, nor offer of proof, as in the Servel case, that the plaintiff in the case at bar could have secured currency if Swan had appeared earlier in the day.

It was admitted that the banks closed at three P. M.

Molumphy did not appear to do business until after that hour.

Surely we cannot assume, in the absence of evidence, that the plaintiff could have cashed his certificate of deposit for $2,500.00 after three P. M. in either South Deerfield or Greenfield.

The case of

Vick vs. Howard, 136 Va. 101,

is authority for the principle that a demand for legal tender on the last day set for performance and late in the evening is not of itself enough to show "obstruction or prevention" of performance.

And in the case of

Beach & Clarridge Co. vs. American Steam Gauge Co., 202 Mass. 177,

the court held that the defendant was well within his rights in refusing to receive a cashier's check for $5,000.00 instead of actual money, or to give the bidder time to procure the money thereon, even though this could be done in fifteen or twenty minutes.

We respectfully submit, therefore, that the court was right in its ruling.

During the course of the hearing it appeared that the purchase money mortgage to be given by the plaintiff covering the real estate to be bought, was not signed by the wife of the plaintiff.

Obviously, under Massachusetts decisions, such a mort-

gage did not need the wife's signature to release dower as the seisin was instantaneous.

The court, however, commented on the lack of her signature, but it clearly appears from the remarks of the court (R. Pg. 193) that this did not influence him in directing the verdict.

However, it is of no materiality because if the court was right on the issue in chief as to tender and obstruction, it becomes of no importance.

It has been suggested that there was a substantial performance, but obviously the doctrine of substantial performance is not applicable in the case at bar.

There is no such thing, at least known to us, as a "substantial tender." Either the tender is good or bad.

It may be that this court will feel, as the presiding Justice did, before the evidence and case was closed, and as appears by the record,

> "that the attitude of the defendant was entirely unreasonable and taken by a man who wanted to escape his honest obligations."

Certain it is, though, that the defendant offered and insisted that his contract be literally carried out. *He was ready to do this* and demanded that the other party do likewise.

It must be remembered that for one or two hours that afternoon and evening, before any check or money was talked about or offered, there had been considerable wrangling and feeling.

Whether the defendant was morally right or wrong is, we apprehend, of no importance in this case, provided that the defendant personally did no *overt act* to obstruct performance by the plaintiff.

If damage came to the plaintiff, it resulted from his own delay, carelessness or negligence in not providing himself with proper legal tender, and in not exercising his rights

under the contract until the last part of the last day for exercising them.

Legally, the motive of the defendant is of no importance and damages can never be recovered where they result from a lawful and legal act of the defendant.

> Randall vs. Hazelton et al., 12 Allen, 412 *a* 415.
> Boyd vs. Stone, 11 Mass. *a* 341.

We respectfully submit, therefore, that there was no error in the trial of this case and that the judgment should be affirmed.

Respectfully submitted,

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